9 FAM 40.63 NOTES

(TL:VISA-542; 05-20-2003)
(Office of Origin: CA/VO/L/R)

9 FAM 40.63 N1 APPLICATION OF INA 212(A)(6)(C)(I)

9 FAM 40.63 N1.1 Intent of Congress

(TL:VISA-175; 01-15-1998)

INA 212(a)(6)(C)(i) constitutes a ground of ineligibility which was not included in legislation prior to 1952. The adoption of this provision expresses the concern with which Congress viewed cases of aliens resorting to fraud or willful misrepresentations for the purpose of obtaining visas or otherwise effecting an unauthorized entry into the United States. The section is intended to prevent aliens from attempting to secure entry into this country by fraudulent means and then, when the falsity is discovered, proceeding with an application as if nothing had happened. An amendment contained in Public Law 99-639 of November 10, 1986, removed the former distinction between past attempts to procure documentation and past attempts to enter by fraud or misrepresentation. Effective with the date of enactment, all of the prohibited acts carry the same penalty ineligibility for a visa and inadmissibility.

9 FAM 40.63 N1.2 NOT A SUBSTITUTE FOR OTHER INA 212(A) INELIGIBILITY

(TL:VISA-175; 01-15-1998)

INA 212(a)(6)(C)(i) was not intended by Congress, on the other hand, to be a substitute for the other grounds of ineligibility provided by the INA nor for grounds that do not exist in the INA. It should not be used to accomplish indirectly that which cannot be accomplished directly. The section was not intended to permit and must not become a device for entrapment of aliens whom the consular officer might suspect to be ineligible on some other ground(s) for which there is not sufficient evidence to sustain a finding of ineligibility. Although consular officers should always bear in mind all INA provisions governing the eligibility or exclusion of certain specifically

described classes, it must also be borne in mind that aliens may not be denied visas simply because they do not seem to be particularly desirable individuals as either immigrants or nonimmigrants.

9 FAM 40.63 N1.3 Nature of Penalty

(TL:VISA-175; 01-15-1998)

In applying the provisions of INA 212(a)(6)(C)(i), consular officers should keep in mind the severe nature of the penalty the alien incurs: lifetime exclusion, unless a waiver is obtainable. [See 9 FAM 40.63 N9.] When imposing such a dire penalty, the consular officer should keep in mind the words quoted by the Attorney General in his landmark opinion on this matter. (The Matter of S- and B-C, 9 I&N Dec. 436, at 447.)

"Shutting off the opportunity to come to the United States actually is a crushing deprivation to many prospective immigrants. Very often it destroys the hopes and aspirations of a lifetime, and it frequently operates not only against the individual immediately but also bears heavily upon his family in and out of the United States."

9 FAM 40.63 N2 CRITERIA FOR FINDING OF INELIGIBILITY

(TL:VISA-175; 01-15-1998)

In order to find an alien ineligible under INA 212(a)(6)(C)(i), it must be determined that:

(1) There has been a misrepresentation made by the applicant [see 9 FAM 40.63 N4];

(2) The misrepresentation was willfully made [see 9 FAM 40.63 N5]; and

(3) The fact misrepresented is material [see 9 FAM 40.63 N6]; or

(4) The alien uses fraud [see 9 FAM 40.63 N3] to procure a visa or other documentation [see 9 FAM 40.63 N7] to receive a benefit under the INA [see 9 FAM 40.63 N7].

9 FAM 40.63 N3 DIFFERENT STANDARDS FOR FINDINGS OF "FRAUD" OR "WILLFULLY MISREPRESENTING A MATERIAL FACT"

(TL:VISA-147; 07-9-1996)

a. The fact that Congress used the terms "fraud" and "willfully misrepresenting a material fact" in the alternative indicates an intent to set a lower standard than is required in making a finding of what is known in the law as fraud. The distinction between the two terms is not readily apparent. For the purposes of this section, the Board of Immigration Appeals has determined that a finding of "fraud" requires a determination that the alien made a false representation of a material fact with knowledge of its falsity and with the intent to deceive a consular or immigration officer. Further, the representation must have been believed and acted upon by the officer. (See Matter of G, 7 I&N 161, 1956.) On the other hand, "material misrepresentation" includes simply a false misrepresentation, willfully made, concerning a fact which is relevant to the alien's visa entitlement. It is not necessary that an "intent to deceive" be established by proof, or that the officer believes and acts upon the false representation. (See Matter of S and B-C, 9 I&N 436, 448-449 (A.G. 1961) and Matter of Kai Hing Hui, 15 I&N 288 (1975)).

b. Most cases of ineligibility under this section will involve "material misrepresentations" rather than "fraud" since actual proof of an alien's intent to deceive may be hard to come by. As a result, the Notes in this section will deal principally with the interpretation of "material misrepresentation".

9 FAM 40.63 N4 INTERPRETATION OF THE TERM "MISREPRESENTATION"

9 FAM 40.63 N4.1 "Misrepresentation" Defined

(TL:VISA-175; 01-15-1998)

As used in INA 212(a)(6)(C)(i), a misrepresentation is an assertion or manifestation not in accordance with the facts. Misrepresentation requires an affirmative act taken by the alien. A misrepresentation can be made in various ways, including in an oral interview or in written applications, or by submitting evidence containing false information.

9 FAM 40.63 N4.2 Differentiation Between Misrepresentation and Failure to Volunteer Information

(TL:VISA-175; 01-15-1998)

In determining whether a misrepresentation has been made, it is necessary to distinguish between misrepresentation of information and information that was merely concealed by the alien's silence. Silence or the failure to volunteer information does not in itself constitute a misrepresentation for the purposes of INA 212(a)(6)(C)(i).

9 FAM 40.63 N4.3 Misrepresentation Must Have Been Before U.S. Official

(TL:VISA-175; 01-15-1998)

For a misrepresentation to fall within the purview of INA 212(a)(6)(C)(i), it must have been practiced on an official of the U.S. Government, generally speaking, a consular officer or an INS officer.

9 FAM 40.63 N4.4 Misrepresentation Must Be Made on Alien's Own Application

(TL:VISA-175; 01-15-1998)

The misrepresentation must have been made by the alien with respect to the alien's own visa application. Misrepresentations made in connection with some other person's visa application do not fall within the purview of INA 212(a)(6)(C)(i). Any such misrepresentations may be considered with regard to the possible application of INA 212(a)(6)(E).

9 FAM 40.63 N4.5 Misrepresentation Made by Applicant's Attorney or Agent

(TL:VISA-175; 01-15-1998)

The fact that an alien pursues a visa application through an attorney or travel agent does not serve to insulate the alien from liability for misrepresentations made by such agents, if it is established that the alien was aware of the action being taken in furtherance of the application. This standard would apply, for example, where a travel agent executed a visa application on an alien's behalf. Similarly, an oral misrepresentation made

on behalf of an alien at the port of entry by an aider or abettor of the alien's illegal entry will not shield the alien in question from ineligibility under INA 212(a)(6)(C)(i), irrespective of what penalties the aider or abettor might incur, if it can be established that the alien was aware at the time of the misrepresentation made on his or her behalf.

9 FAM 40.63 N4.6 Timely Retraction

(TL:VISA-313; 08-27-2001)

A timely retraction will serve to purge a misrepresentation and remove it from further consideration as a ground for INA 212(a)(6)(C)(i) ineligibility. Whether a retraction is timely depends on the circumstances of the particular case. In general, it should be made at the first opportunity. If the applicant has personally appeared and been interviewed, the retraction must have been made during that interview. If the misrepresentation has been noted in a "mail-order" application, the applicant must be called in for an interview and the retraction must be made during the course thereof. For this reason, aliens shall be warned of the penalty imposed by INA 212(a)(6)(C)(i) at the outset of every initial interview. Guidance may be sought through the advisory opinion process (CA/VO/L/A). [See 9 FAM 40.63 PN1.]

9 FAM 40.63 N4.7 Applying the 30/60 Day Rule

(TL:VISA-342; 01-08-2002)

a. In determining whether a misrepresentation has been made, some of the most difficult questions arise from cases involving aliens in the United States who conduct themselves in a manner inconsistent with representations they made to the consular officers concerning their intentions at the time of visa application. Such cases occur most frequently with respect to aliens who, after having obtained visas as nonimmigrants, either:

   (1) Apply for adjustment of status to permanent resident; or

   (2) Fail to maintain their nonimmigrant status (for example, by engaging in employment).

b. To address this problem, the Department developed the 30/60-day rule. This rule is intended to facilitate adjudication of these types of cases consistent with the statutory mandates.

c. Aliens who apply for adjustment of status pursuant to the INA are within

the jurisdiction of the Immigration and Naturalization Service unless the application is abandoned upon the departure of the alien from the United States. Upon receipt of a notice of application for adjustment of status Form G-325A, *Biographic Information*, therefore, it would not be appropriate for a consular officer to seek the Department's concurrence in a finding of ineligibility since such a finding would not be binding upon the INS. Instead, the post should bring available derogatory information to the attention of the appropriate INS office by a VISAS DECEMBER cable. [See 9 FAM 40.63 PN2.]

d. With respect to the second category referred to above, the fact that an alien's subsequent actions are other than as stated at the time of visa application or entry does not necessarily prove that the alien's intentions were misrepresented at the time of application or entry. As to those who fail to maintain status, the consular officer should also recognize that the precise circumstances under which the change in activities or the overstay arose have an important bearing on whether a knowing and willful misrepresentation was made. The existence of a misrepresentation must therefore be clearly and factually established by direct or circumstantial evidence sufficient to meet the "reason to believe" standard. Although indeed more flexible than the judicial "beyond reasonable doubt" standard demanded for a conviction in court, a "reason to believe" standard requires that a probability exists, supported by evidence which goes beyond mere suspicion.

9 FAM 40.63 N4.7-1 Applying 30/60 Day Rule When Alien Violates Status

(TL:VISA-313; 08-27-2001)

a. The consular officer should apply the 30/60-day rule if an alien states on his or her application for a B-2 visa, or informs an immigration officer at the port of entry, that the purpose of his or her visit is tourism, or to visit relatives, etc., and then violates such status by:

(1) Actively seeking unauthorized employment and, subsequently, becomes engaged in such employment;

(2) Enrolling in a program of academic study without the benefit of the appropriate change of status;

(3) Marrying and takes up permanent residence, or

(4) Undertakes any other activity for which a change of status or an adjustment of status would be required, without the benefit of such a change or adjustment.

9 FAM 40.63 N4.7-3 After 30 days but Within 60

(TL:VISA-313; 08-27-2001)

If an alien initiates such violation of status more than 30 days but less than 60 days after entry into the United States, no presumption of misrepresentation arises. However, if the facts in the case give the consular officer reasonable belief that the alien misrepresented his or her intent, then the consular officer must give the alien the opportunity to present countervailing evidence. If the officer does not find such evidence to be persuasive, then the consular officer must submit a comprehensive report to the Department (CA/VO/L/A) for the rendering of an advisory opinion.

9 FAM 40.63 N4.7-4 After 60 Days

(TL:VISA-313; 08-27-2001)

When violative conduct occurs more than 60 days after entry into the United States, the Department does not consider such conduct to constitute a basis for an INA 212(a)(6)(C)(i) ineligibility.

9 FAM 40.63 N4.8 Evidence of Violation of Status

(TL:VISA-313; 08-27-2001)

a. To find an alien ineligible under INA 212(a)(6)(C)(i) there must be evidence that, at the time of the visa application or entry into the United States, the alien stated orally or in writing to a consular or immigration officer that the purpose of the visit to the United States was other than to work or remain indefinitely. Ordinarily, such evidence would be in the form of an admission, from information taken from the alien's NIV application, or a report by an immigration officer that the alien made such a statement, e.g., as would be found on the INS Form I-275, *Withdrawal of Application/Consular Notification.* Additionally, all findings of ineligibility under the 30/60-day guidelines described in 9 FAM 40.63 N4.7-1 through 9 FAM 40.63 N4.7-4 would require the Department's concurrence following submission of an advisory opinion request.

b. The burden of proof falls on the alien to establish that his or her true intent was to visit, tour, etc. In the absence of any further offering of proof by the alien to rebut the presumption, a finding of ineligibility will result. The consular officer must give the alien the opportunity to rebut the presumption by presentation of evidence to overcome it. If the consular officer is satisfied that the presumption is overcome, and the alien is otherwise eligible, the consular officer shall process the case to conclusion. If the presumption is not overcome, the consular officer must

submit a description of the evidence submitted by the alien in a report to CA/VO/L/A. The report must include evidence of the actual representation, i.e:

(1) Evidence that the alien violated status within 30 days. [See 9 FAM 40.63 N4.7-2;]

(2) Evidence of such misrepresentation from the actual visa application or application for entry; or

(3) The consul's statement that the applicant has admitted that he or she misrepresented the purpose of his or her visit on the visa application or to the immigration officer.

9 FAM 40.63 N5 INTERPRETATION OF TERM "WILLFULLY"

9 FAM 40.63 N5.1 "Willfully" Defined

(TL:VISA-175; 01-15-1998)

The term "willfully" as used in INA 212(a)(6)(C)(i) is interpreted to mean knowingly and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. In order to find the element of willfulness, it must be determined that the alien was fully aware of the nature of the information sought and knowingly, intentionally, and deliberately made an untrue statement.

9 FAM 40.63 N5.2 Misrepresentation is Alien's Responsibility

(TL:VISA-4; 11-19-1987)

An alien who acts on the advice of another is considered to be exercising the faculty of conscious and deliberate will in accepting or rejecting such advice. It is no defense for an alien to say that the misrepresentation was made because someone else advised the action unless it is found that the alien lacked the capacity to exercise judgment.

9 FAM 40.63 N6 INTERPRETATION OF TERM "MATERIAL FACT"

9 FAM 40.63 N6.1 "Materiality" Defined

(TL:VISA-175; 01-15-1998)

Materiality does not rest on the simple moral premise that an alien has lied, but must be measured pragmatically in the context of the individual case as to whether the misrepresentation was of direct and objective significance to the proper resolution of the alien's application for a visa. The Attorney General has declared the definition of "materiality" with respect to INA 212(a)(6)(C)(i) to be as follows:

"A misrepresentation made in connection with an application for a visa or other documents, or with entry into the United States, is material if either:

(1) The alien is excludable on the true facts; or

(2) The misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded." (Matter of S- and B-C, 9 I&N 436, at 447.)

9 FAM 40.63 N6.2 Independent Ground of Ineligibility

(TL:VISA-175; 01-15-1998)

The first part of the Attorney General's definition of materiality comprises those cases where the material facts disclose a situation rendering the alien ineligible for a visa as a matter of law. These are known as independent or objective grounds of ineligibility. Objective grounds of ineligibility are those encompassed within the provisions of INA 212(a)(1) through (10).

9 FAM 40.63 N6.2-1 Special Circumstances

(TL:VISA-175; 01-15-1998)

a. There are few circumstances under which the concealment of the possible applicability of an independent ground of ineligibility may not be deemed to be material to the applicant’s eligibility for a visa. There are a few grounds of ineligibility which contain provisions under which some aliens may be relieved of ineligibility by operation of law.

b. This is true, for example, of INA 212(a)(2)(A)(i)(I) and 212(a)(3)(B). In judicial and administrative decisions about the applicability of INA 212(a)(6)(C)(i), a distinction has been drawn between those other provisions of INA 212 which grant relief from ineligibility as a result of an

evaluation of all relevant factors pro and con, on the one hand, and those which provide relief automatically by standard operation of law. The essence of these decisions, according to the Attorney General, is that:

(1) The fact in question is material if the final determination of relief would depend on an exercise in judgment – i.e., one cannot predicate immateriality on the possibility that the exercise of judgment would have erased the ground of ineligibility when it is also possible that the judgment could have gone the other way;

(2) The fact is not material under INA 212(a)(6)(C)(i) if the relief stems from the automatic operation of law; and

(3) Although there is an element of the "rule of probability" in (1), essentially the determination relies on the "true facts" aspect of the Attorney General's definition of materiality. That is, if the true facts disclose a ground of ineligibility and relief therefrom is problematic, the facts are material; if not, the facts are not material, as reflected in (2).

9 FAM 40.63 N6.3 "Rule of Probability" Defined

(TL:VISA-4; 11-19-1987)

The second part of the Attorney General's definition is directed to those cases when the alien's misrepresentation tended to shut off a line of inquiry which is relevant to visa eligibility. These are cases where the exercise of further consular judgment is required. Past judicial and administrative decisions concerning this part have evolved into what has become to be known as the "rule of probability."

9 FAM 40.63 N6.3-1 "Tends" Defined

(TL:VISA-175; 01-15-1998)

The word "tends" as used in "tended to cut off a line of inquiry" means that the misrepresentation must be of such a nature as to be reasonably expected to foreclose certain information from the consular officer's knowledge. It does not mean that the misrepresentation must have been successful in foreclosing further investigation by the consular officer in order to be deemed material; it means only that the misrepresentation must reasonably have had the capacity of foreclosing further investigation.

(1) If an alien's eligibility for a visa is resolved against the alien on the known circumstances of the case, a subsequent discovery that the alien had misrepresented certain aspects of the case would not be

considered material since the misrepresented facts did not tend to lead the consular officer into making an erroneous conclusion. For example, an applicant for a nonimmigrant visa falsifies the visa application by claiming to have a well-paying job in order to show that the applicant has a residence abroad, but before the misrepresentation was discovered, the visa was refused because the alien could not, on the known facts, qualify as a nonimmigrant. The subsequent ascertainment of the false statement would not support a finding of materiality because it had no objective significance to the finding that the alien was not a nonimmigrant.

(2) If the truth of the fact being misrepresented is available to the consular officer through the visa lookout system, or through reference to the post's own files, it cannot be said that the alien's misrepresentation tended to cut off a line of inquiry since the line of inquiry was readily available to the consular officer. While the availability of the true facts does not support the "materiality" of the misrepresentation under the "rule of probability" (part two of the Attorney General's definition), if those facts disclose an independent ground of ineligibility, then the misrepresentation is material under the first part of the Attorney General's definition. [See 9 FAM 40.63 N6.1.]

9 FAM 40.63 N6.3-2 Questionable Cases

(TL:VISA-147; 07-09-1996)

Frequently, a question arises concerning the effect on ineligibility of a false document presented in support of an application, or a false statement made to a consular officer, each of which purports to establish a fact which is material to the application for a visa, but which, in the case of the document, is so poorly crafted, or in the case of the statement is so unbelievable as to lack credibility. Despite the lack of credibility, if the document or statement is offered for the purpose of establishing a fact which would be material if the information in the document or statement were to be accepted as truthful, the consular officer may consider that the document or statement "tends" to cut off a line of inquiry.

9 FAM 40.63 N6.3-3 Facts Considered Material

(TL:VISA-118; 06-30-1995)

a. Residence and Identity: At one time the facts of residence and identity were considered to be material in themselves. This is no longer true. Misrepresentations of residence and identity are now considered to be on

the same footing as other misrepresentations and will be considered material only if the alien is excludable on the facts or the misrepresentation tends to cut off a relevant line of inquiry which might have led to a proper finding of ineligibility.

b. Misrepresentations Concerning Previous Visa Applications:

(1) Registration for immigration does not render an alien ineligible for a nonimmigrant visa, in itself, but it does raise questions about the nonimmigrant intent of the applicant. Because a misrepresentation with respect to such a registration might tend to cut off the proper line of inquiry into the nonimmigrant intent of the alien, such a misrepresentation is normally considered to be of material importance. However, there may be factors, including events intervening between the registration and the nonimmigrant visa application that shall render a prior registration for an immigrant visa immaterial in connection with the nonimmigrant visa application at hand. Although no list of exemplary intervening events may be all-inclusive, one might include:

(a) A marriage;

(b) A purchase of a new home;

(c) A substantial investment in the local economy; and

(d) A business or familial emergencies in the United States.

(2) A misrepresentation concerning a previous immigration registration on the part of an immigrant visa applicant would not be considered to be material unless the misrepresentation also concealed the existence of an independent ground of ineligibility.

(3) A misrepresentation concerning a previous application for a nonimmigrant visa made on the part of an immigrant visa applicant is not of itself considered to be material.

(4) A nonimmigrant visa applicant's misrepresenting the fact that the applicant was previously refused a nonimmigrant visa is not, in itself, a material misrepresentation, even though the consular officer may feel that knowledge of the previous visa refusal might have been useful. In the absence of anything to the contrary, it must be assumed that the previous refusal was predicated on the previous interviewing officer's finding that the alien was not a qualified nonimmigrant at the time of that interview. Such an opinion is necessarily limited to the circumstances of the alien's case at the time of that particular application. Since circumstances

change, eligibility must be decided in light of the current situation on each application. Consequently, a misrepresentation which conceals only the fact of a previous refusal is not material. Naturally, where the misrepresentation conceals not only the fact of the previous refusal, but also objective information not otherwise known or available to the second consular officer, it is possible that a finding could be made that the absence of such facts tended to cut off a line of inquiry and thus rendered the misrepresentation material.

9 FAM 40.63 N6.3-4 Application of Phrase "Which Might Have Resulted"

(TL:VISA-175; 01-15-1998)

In order to sustain a finding of materiality, it must be shown that the information foreclosed by the misrepresentation was of basic significance to the alien's eligibility for a visa. The information concealed by the misrepresentation must, when balanced against all the other information of record, have been controlling or crucial to a final decision of the alien's eligibility to receive a visa. For example, if an alien was trying to establish ties abroad by submitting false evidence of particular employment in an effort to establish nonimmigrant status and it appeared that the alien had other ties meriting favorable consideration, the misrepresentation would not be considered to be material unless the consular officer could state categorically that, if the true state of affairs had been known, no visa could properly have been issued.

9 FAM 40.63 N6.3-5 Application of Phrase "In a Proper Refusal if the Truth Had Been Known"

(TL:VISA-313; 08-27-2001)

a. In most cases, in order for a fact to be considered material, the truth of the matter must lead to a proper finding of ineligibility. With the exception of the types of cases discussed in 9 FAM 40.63 N6.2-1, if the facts support a finding that the alien is eligible for a visa, the misrepresented fact is not material.

   (1) If an alien were to make a misrepresentation to establish an advantageous immigrant visa status and it were discovered that the alien was, in truth, entitled to another equally advantageous status, the misrepresentation would not be considered to be material. For example, if the son or daughter of an U.S. citizen were to misrepresent marital status as being unmarried for the purpose of

qualifying for first preference status, and was, in fact, married and thus qualified for only third preference consideration, but the third preference was currently available for the alien's state of chargeability, the misrepresentation shall not be considered material. If, however, there were a waiting period for third preference applicants in the state of the alien's chargeability or world-wide, the alien shall then be found to have sought an unwarranted advantage by means of a willful misrepresentation and the misrepresentation would, therefore, be material.

(2) If an alien were to make a misrepresentation in order to enhance or exaggerate the alien's qualifications for a visa, but the facts alone were sufficient to establish qualifications, the misrepresentation would not be considered to be material. For example, if an alien were to misrepresent employment prospects in the United States as a means of establishing qualifications for a visa under INA 212(a)(4), and it were discovered that, in truth, the alien had other comparable employment or other satisfactory prospects, the misrepresentation is not considered material.

b. Once it has been established that a misrepresentation was made in securing a visa, the burden is on the person making the misrepresentation to establish that the facts support eligibility or that, had the consular officer known the truth, a refusal of a visa could not properly have been made. The consular officer shall be receptive to any further evidence the alien may provide in order to ensure that a proper finding has been made. To quote further from the Attorney General's opinion:

"The law recognizes numerous situations in which one who, by his intentional and wrongful act, has prevented or restricted an inquiry into relevant facts bears the burden of establishing the true facts and the risk that any uncertainties resulting from his own obstruction of the inquiry may be resolved against him." (9 I&N Dec. 449N Dec. 4499.)

9 FAM 40.63 N6.4 Cases Not Involving the "Rule of Probability"

(TL:VISA-313; 08-27-2001)

a. Consular officers need not submit cases of the following types to the Department for an advisory opinion since they do not involve the "rule of probability." Cases where the alien has expressly admitted to the consular officer that, at the time the alien applied for a visa or entry into the United States as a visitor, it was the alien's intention to accept

unauthorized employment in the United States or to reside indefinitely in the United States. A written confession is not required if:

(1) The alien admitted under oath to the misrepresentation;

(2) The officer has accurately recorded the statement in the notes of the interview;

(3) The officer has signed and dated the notes; and

(4) The officer has filed in the Category I file under the alien's name.

b. Cases where INS has reported to the consular officer that an alien attempted to enter or procured entry into the United States by presenting to the inspecting officer at the port of entry forged or material altered entry documentation. Such documentation may include a U.S. visa, a foreign passport or a U.S. passport; if such documentation was required under the INA or other laws of the United States for the alien's entry, or, in the case of the U.S. passport, if the alien was posing as a U.S. citizen for the purpose of gaining illegal entry.

9 FAM 40.63 N7 SEEKING ADVISORY OPINIONS

9 FAM 40.63 N7.1 Cases Involving the Rule of Probability

(TL:VISA-313; 08-27-2001)

a. In view of the judicial and administrative uncertainties surrounding the rule of probability, and in order to achieve uniformity in the application of the rule throughout the world, certain cases falling under that rule in which the consular officer decides against the interests of the applicant must be submitted to the Department for an advisory opinion. Although consular officers may submit any difficult cases, no advisory opinion is required:

(1) Cases decided in the applicant's favor;

(2) Cases involving use of fraudulent documentation related to establishing qualification for a particular nonimmigrant category in order to overcome the presumption of intending immigration in INA 214(b). Such documents would include:

(a) Fraudulent primary documentation, such as job letters;

(b) School enrollment records;

(c) Deeds; or

(d) Bank or business statements relating to personal financial stability or to business ownership and activity, or similar documents, other than tax records, considered by the consular officer to be critical to the visa qualification of an applicant.

(3) Cases in which the INS has revoked a petition submitted to it for review by a consular officer on the basis of fraud;

(4) DV cases, where there is a misrepresentation of the education or work requirements needed to qualify for the visa, or where it is established in accordance with existing guidance that multiple lottery entries were filed by the applicant, or on the applicant's behalf if the applicant is aware of the additional entry or entries at the time of visa application; or

(5) Cases based on evidence developed at the port of entry. (See 9 FAM 40.63 N8.)

b. A request for an advisory opinion must include:

(1) An explanation of the nature of the misrepresentation showing what facts were misrepresented and, if the issue is in question, evidence showing that the misrepresentation was willfully made;

(2) The alien's explanation, if available, as to why the misrepresentation was made;

(3) The officer's statement concerning the materiality of the misrepresentation with the officer's finding of whether a visa would have been issued if the facts of the matter had been known; and

(4) The officer's statement that the alien was offered an opportunity to present additional evidence that he or she is otherwise eligible in order to overcome the effect of the misrepresentation and a statement that:

(a) The alien refused the opportunity or failed to take advantage of it; or

(b) A statement by the officer describing the evidence submitted by the alien.

9 FAM 40.63 N8 CASES BASED ON EVIDENCE DEVELOPED AT PORT OF ENTRY

(TL:VISA-313; 08-27-2001)

INS may provide the consular officer with evidence that a port-of-entry official denied an alien admission on the grounds of INA 212(a)(6)(C)(i). The Department considers these statements to reflect only the officer's opinion at the time. No entry is made in CLASS unless the alien has formally been found inadmissible under INA 212(a)(6)(C)(i) either through formal removal proceedings, summary removal under amended INA 235(b), or otherwise. However, if INS has made a "6C1" entry in the lookout system, the post may assume that a formal finding of ineligibility was made, and the consular officer should refuse the visa application under INA

212(a)(6)(C)(i). If a class check reveals no "6C1", or INS entry, or only a P6C entry, the consular officer should not consider the notation on the Form I-275, *Withdrawal of Application/Consular Notification,* alone, sufficient to justify a determination of ineligibility. The consular officer, however, may use the factual evidence cited in the Form I-275 as the basis for a flue of probability determination if the consular officer believes that the evidence is sufficient to justify a finding of ineligibility.

9 FAM 40.63 N9 INTERPRETATION OF TERMS "OTHER DOCUMENTATION" OR "OTHER BENEFIT"

9 FAM 40.63 N9.1 "Other Documentation"

(TL:VISA-313; 08-27-2001)

a. The "other documentation" mentioned in the text of INA 212(a)(6)(C)(i), in addition to visas, refers to documents required at the time of an alien's application for admission. This includes such documents as:

   (1) Reentry permits;

   (2) Border crossing identification cards;

   (3) U.S. Coast Guard identity cards; and

   (4) U.S. passports.

b. Such documents as applications for parole into the United States or

extensions of stay are not considered to be entry documents under INA 212(a)(6)(C)(i). Other types of documents, such as Form I-20, *Certificate of Eligibility for Nonimmigrant (F-1) Student Status for Academic and Language Students,* petitions, and labor certification forms are documents in support of a visa application. Consular officers must judge these documents in the light of their effect on a visa application. In themselves, they are not "other documentation" within the meaning of INA 212(a)(6)(C)(i). As stated in 9 FAM 40.63 N4.3, in order for a misrepresentation to be considered within the purview of this section, the misrepresentation must have been made to an official of the U.S. Government. Counterfeit documents or documents obtained by fraud or willful misrepresentation presented to foreign government officials or other individuals are relevant under INA 212(a)(6)(C)(i) only at the time of entry.

9 FAM 40.63 N9.2 "Other Benefit"

(TL:VISA-313; 08-27-2001)

The term "other benefit" refers to any immigration benefit or entitlement provided for by the Immigration and Nationality Act, as amended, and may in a given case include:

(1) Requests for extension of stay, change of NIV status, permission to re-enter, waiver of INA 212(e) requirement, alien employment certification, advance authorization to re-enter, voluntary departure, adjustment of status, stay of deportation;

(2) Application for Forms I-20, *Certificate of Eligibility for Nonimmigrant (F-1) Student Status for Academic and Language Students,* and DS-2019, *Certificate of Eligibility for Exchange Visitor (J-1) Status;* and

(3) All petitions applicable only to misrepresentations made by the petition's beneficiary or by an agent representing such beneficiary.

9 FAM 40.63 N9.3 Advisory Opinion Requests

(TL:VISA-313; 08-27-2001)

Consular officers should request an advisory opinion from the Department (CA/VO/L/A) in those cases where the consular officer believes that some other item constitutes a "benefit" under the Immigration and Nationality Act.

9 FAM 40.63 N10 MISCELLANEOUS

9 FAM 40.63 N10.1 Misrepresentation in Family Relationship Petitions

(TL:VISA-313; 08-27-2001)

Pursuant to 8 CFR 205, invalidation of a labor certification for fraud in accordance with the instructions of INS or the Department of State automatically revokes an employment-based immigrant visa petition. On the other hand, INS retains exclusive authority to disapprove or revoke family-relationship immigrant visa petitions. Thus, a misrepresentation with respect to entitlement to status under a family-relationship petition, e.g., document fraud, sham marriage or divorce, etc., cannot be deemed material as long as the petition is valid. Upon discovery of a misrepresentation, the consular officer must return the petition to the INS office having jurisdiction over the petitioner's place of residence [See 22 CFR 42.43. If the petition is revoked, the materiality of the misrepresentation is established.

9 FAM 40.63 N10.2 Attempts to Obtain Visa by Bribery

(TL:VISA-313; 08-27-2001)

The Department has held that an attempt by an unqualified applicant to obtain a visa through bribery is an attempt to perpetrate fraud on the U.S. Government in the person of the consular officer if the fraud is directed at a Foreign Service national employee, or at the INS officer at port of entry, or if the bribe is directed at the consular officer. Ordinarily, the Department's advisory opinion should not be required, but posts should cable the circumstances of all such cases to the attention of the appropriate Departmental offices, e.g., CA/VO/L/A, CA/FPP, and DS/CR/VF.

9 FAM 40.63 N11 INELIGIBILITY UNDER INA 212(A)(6)(C)(II)

(TL:VISA-313; 08-27-2001)

Sec. 344(a) of Public Law 104-208, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), added a new exclusion ground to INA 212. In general, the exclusion ground permanently bars an alien who has falsely claimed U.S. citizenship in order to obtain a U.S. passport, entry into the United States, or any other benefit under State or Federal law.

9 FAM 40.63 N12 INA 212(A)(6)(C)(II) NOT RETROACTIVE

(TL:VISA-313; 08-27-2001)

The provisions of INA 212(a)(6)(C)(ii) are not retroactive. It applies only to aliens who have made false representation on or after September 30, 1996. An alien who has attempted or achieved entry to the United States before September 30, 1996, on a false claim of U.S. citizenship is not ineligible under the terms of INA 212(a)(6)(C)(ii). They are, however, ineligible under 212(a)(6)(C)(i), provided, such claim was made before a U.S. Government official. This is a significant difference because the waiver provisions of INA 212(a)(6)(C)(iii) apply to aliens ineligible under (6)(C)(i), but not to alien inadmissible under (6)(C)(ii). [See 9 FAM 40.63 N9.]

9 FAM 40.63 N13 SCOPE OF INA 212(A)(6)(C)(II)

(TL:VISA-313; 08-27-2001)

The provisions of INA 212(a)(6)(C)(ii) expand the scope of the ineligibility related to false claims to U.S. citizenship. Ineligibility under (6)(C)(ii) applies not only to an alien who makes false claims to U.S. citizenship in order to obtain a U.S. passport, entry into the United States, or other documentation or benefit under the INA (provided such claim was made before a U.S. Government official), but also applies to an alien who made false claims to U.S. citizenship for any purpose or benefit under any other federal or state law. For example, an alien who made a false claim to U.S. citizenship to obtain welfare benefits or for the purpose of voting in a federal or state elections would be ineligible under INA 212(a)(6)(C)(ii). [See also 9 FAM 40.104 regarding unlawful voters.]

9 FAM 40.63 N14 FALSE CLAIMS TO U.S. CITIZENSHIP UNDER INA 274A

(TL:VISA-313; 08-27-2001)

INA 212(a)(6)(C)(ii) also applies for the purposes of INA 274A, which makes it unlawful to hire an alien who is not authorized to work in the United States. Thus, an alien who makes false claims to U.S. citizenship to secure employment in violation of INA 274A would be ineligible under INA 212(a)(6)(C)(ii).

9 FAM 40.63 N15 CITIZENSHIP CLAIMS MADE TO OTHER THAN U.S. GOVERNMENT OFFICIALS

(TL:VISA-313; 08-27-2001)

There is nothing in the language of INA 212(a)(6)(C)(ii) that would require that the false claim to U.S. citizenship be made to a U.S. official implementing the provisions of the INA. INA 212(a)(6)(C)(ii) specifically says "under this Act or other Federal or State law". Thus, the language presupposes that the false claim may have been made to a State or Federal Government official outside the Department of State or the INS, or even to a prospective employer to circumvent INA 274A.

9 FAM 40.63 N16 WAIVER OR EXCEPTION FOR INA 212(A)(6)(C) INELIGIBILITY

9 FAM 40.63 N16.1 INA 212(d)(3)(A) Waiver for Nonimmigrants

(TL:VISA-313; 08-27-2001)

A consular officer may, in his or her discretion, recommend that INS grant a waiver under INA 212(d)(3)(A) for an alien ineligible under either INA 212(a)(6)(C)(i) or (ii) provided the alien meets the criteria specified in 9 FAM 40.301 N2.

9 FAM 40.63 N16.2 INA 212(i) Waiver for Immigrants

(TL:VISA-542; 05-20-2003)

a. An alien who is ineligible under provision (i) of INA 212(a)(6)(C) may seek a waiver under INA 212(i) if:

   (1) The alien is the spouse, son, or daughter of a U.S. citizen or a lawful resident alien; and

   (2) The Secretary of Homeland Security is satisfied that the refusal of the alien's admission to the United States would result in extreme hardship to the U.S. citizen or lawful resident spouse or parent of such alien.

b. Consular officers should note that INA 212(i), as amended by Public Law 104-208, eliminated the waiver for the parents of a U.S. citizen or lawful resident alien and no longer permits a waiver for misrepresentations which occurred 10 or more years ago.

9 FAM 40.63 N16.3 Alien Ineligible Under INA 212(a)(6)(C)(ii)

9 FAM 40.63 N16.3-1 Exception from Ineligibility Under INA 212(a)(6)(C)(ii)

(TL:VISA-313; 08-27-2001)

The Child Citizenship Act of 2000 (sec. 201(b) of Public Law 106-395) added an exception for inadmissibility under INA 212(a)(6)(C)(ii) for an alien who voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation if:

(1) Each parent is or was a U.S. citizen by birth or naturalization;

(2) The alien resided permanently in the United States prior to the age of 16; and

(3) The alien reasonably believed at the time of such violation that he or she was a U.S. citizen.

9 FAM 40.63 N16.3-2 No Waiver for Inadmissibility Under INA 212(a)(6)(C)(ii)

(TL:VISA-313; 08-27-2001)

There is no waiver available for an alien ineligible under INA 212(a)(6)(C)(ii). Given the different waiver rules, it is critical that consular officers ensure that a false claim to U.S. citizenship has been properly categorized. If a consular officer has any doubt regarding an alien's ineligibility under INA 212(a)(6)(C)(ii), the consular officer should refer the case to the Department (CA/VO/L/A) for an advisory opinion.